Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1994

CAROL PLANT,

Petitioner

vs.

VOUGHT AIRCRAFT COMPANY

Respondent

On Petition For Writ of Certiorari
To The U. S. Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Noemi A. Collie
Counsel of Record
434 W. 12th Street
Dallas, Texas 75208
(214) 942-6812
(214) 942-6818 (fax)

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QUESTIONS PRESENTED

I.

WHETHER PLANT CREATED A GENUINE ISSUE OF MATERIAL FACT REGARDING PRETEXT IN HER TITLE VII AND ADEA CLAIMS THAT WAS SUFFICIENT TO WITHSTAND SUMMARY JUDGMENT?

II.

WHETHER PLANT CREATED A GENUINE ISSUE OF MATERIAL FACT REGARDING VOUGHT'S SPECIFIC INTENT TO INTERFERE WITH HER RIGHTS UNDER ERISA?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
OPINIONS BELOW	4
JURISDICTIONAL STATEMENT	5
STATEMENT OF THE CASE	5
STATEMENT OF JURISDICTION OF COURT OF APPEALS	11
ARGUMENT	12
I. TITLE VII AND ADEA CLAIMS	12
A. STANDARD ON REVIEW	12
B. PROCEDURAL STRUCTURE IN TITLE VII AND ADEA CLAIMS	12
II. ERISA CLAIMS	20
CONCLUSION	21
APPENDIX A	
APPENDIX B	
APPENDIX C	

TABLE OF AUTHORITIES

Page

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).....20

Britt v. The Grocers Supply Co., Inc., 978 F.2d 1441 (5th Cir. 1992).....13

Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408 (5th Cir. 1993).....12

Graefenhain v. Pabst Brewing Co., 827 F.2d 13 (7th Cir. 1987).....14

Herman v. National Broadcasting, Co., Inc., 744 F.2d 604 (7th Cir. 1984).....15

Matagorda County v. Russell Law, 19 F.3d 215 (5th Cir. 1994).....12

McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973).....12

St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742 (1993).....12-13, 15-17, 19-20

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).....12-13, 16-17, 20

OPINIONS BELOW

The District Court rendered Judgment against Plant on May 24, 1994. In granting summary judgment the District Court stated"

> Even if Plant's assertions regarding the credence of Vought's explanations are true, she has failed to present a genuine issue of material fact regarding pretext. Plant must do more than suggest that Vought's proffered reasons for her termination are false; she must raise a genuine issue of material fact that Vought's proffered reasons are a pretext for prohibited *discrimination*. *See St. Mary's Honor Center v. Hicks,* above, ____ U.S. ____, 113 S.Ct. at 2752. Plant has made no such showing and, for this reason, Vought is entitled to summary judgment on her Title VII and ADEA claims. *See Bodenheimer*, above, 5 F.3d at 959.

See Appendix A, p. 8. The District Court stated further:

> For purposes of this memorandum order, the court assumes, without deciding, that Plant has stated a claim for relief under section 1140. Still, Plant fails to raise a genuine issue of material fact regarding Vought's specific intent to violate ERISA when it terminated her. Although "[Plant is] entitled to have reasonable inferences drawn in [her] favor, the inferences to be drawn 'must be rational and reasonable, not idle, speculative, or conjectural.'" *Unida v. Levi Strauss & Company*, 986 F.2d 970, 980 (5th Cir. 1993) (citation omitted). As in *Unida*, it would be speculative to infer that Vought "intended to interfere with [Plant's] entitlement to ERISA benefits from the evidence proffered by [Plant] in support of [her] claims. . . " *Id.* Accordingly, Vought's motion for summary judgment on this claim must be granted.

See Appendix A, p. 4.

On November 30, 1994 the United States Court of Appeals for the Fifth Circuit affirmed the District Court's

ruling. Judge King, dissenting in part, found Plant had created a genuine issue of pretext as regards her Title VII and ADEA claims. On January 6, 1995 the Court of Appeals, treating Plant's Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, denied Plant a rehearing. *See* Appendix C, 2.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked pursuant to its review authority conferred by Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. Secs. 2000e-17, the Age Discrimination in Employment Act of 1967, as amended 29 U.S.C. Secs. 621-34, and Sec. 510 of the Employment and Retirement Income Security Act of 1974, 29 U.S.C. Sec. 1440. The District Court rendered summary judgment on May 24, 1994. The Court of Appeals for the Fifth Circuit affirmed the District Court's summary judgment on November 30, 1994 and denied a rehearing on January 6, 1995

STATEMENT OF THE CASE

Plant was 46 years of age and had been employed by Vought for a total of 26 years when she was laid off on November 20, 1992 during a reduction in force. (R. Vol. II, p. 42, 52-3). During her employment, Plant had worked her way up from a clerk typist, to a stenographer, to a secretary, a position she held for approximately 11 years. (R. Vol. II, p. 42-3). In mid 1986, in hopes of moving further up the corporate ladder, Plant made a lateral move to that of a Planning Aide handling scheduling assignments. (R. Vol. II, p. 42-3). Although a planning aide would normally be a labor grade 23 or better, Plant continued to work as a labor grade 6. (R. Vol. II, p. 43-4).

In early March, 1989 Plant was informed that the scheduling position she held at the time would be eliminated

and that she should start looking for other positions within the company. (R. Vol. II, p. 44). Plant did so and applied for numerous available jobs for which she was qualified ranging from labor grade 6's to labor grade 23's. (R. Vol. II, p. 46, 426). None were offered to her. (R. Vol. II, p. 46). In October, 1989 Plant was placed under a different Manager, Tom Woodling. During his deposition, Mr. Woodling admitted that Plant would not have been allowed to apply for these jobs had she not been qualified for them. (R. Vol. II, p. 155).

Plant's 1989 evaluations described her as not being assertive and as failing to take initiative. (R. Vol. II, p. 44-5, 56-7).

In mid January, 1990 Plant was informed by Woodling she was being transferred to the secretarial pool because of a reduction in force in her department. (R. Vol. II, p. 44). Her immediate supervisor became Carol McCauley. (R. Vol. II, p. 45). Her Manager became Dillon Smith. (R. Vol. II, p. 45). Shortly after the transfer to the secretarial pool, Plant was informed that if she did not find another position soon her labor grade and salary would be downgraded. (R. Vol. II, p. 45, 424). At that time Plant met with a personnel representative, Dottie Garner, and complained that she felt Vought was capable of finding her another position so that her labor grade and salary would not have to be cut and that she did not feel she was being treated fairly after so many years of loyal service. (R. Vol. II, p. 45-6). As a result of that meeting notes were maintained by McCauley in a file on Plant which memorialized the meeting, the personnel representative's belief that Plant would be one to file an EEO complaint, and her intent to notify management they had a personnel problem. (R. Vol. II, p. 214, 287-8, 360-1, 425, 482-3). When Smith was shown this document during his deposition he was surprised that Plant had it and asked where she got it. (R. Vol. II, p. 360-1). When shown a typed version of these notes, McCauley denied having made them or

knowing anything about the possibility of Plant filing an EEO complaint. (R. Vol. II, p. 287-8, 425). However, when shown the handwritten version of these notes both of McCauley's supervisors identified the handwriting as being hers. (R. Vol. II, p. 214, 360-1, 482-3).

While Plant was in the typing pool she took several refresher courses in word processing as are reflected in Vought's records. (R. Vol. II, p. 46, 503). McCauley testified at trial that Plant was not able to complete any of the word processing programs while she was in the pool. (R. Vol. II, p. 289). McCauley testified during her deposition that Plant had only been given one assignment while in the pool and that was to a non-secretarial position. (R. Vol. II, p. 290, 299-300). Smith testified at trial that Plant had been sent out on several assignments but was unable to handle them and had received poor recommendations from those she was assigned to. (R. Vol. II, p. 353).

Within a week of the meeting with Garner, a job as personnel administrator was found for Plant. (Vol. II, p. 48). As personnel administrator Plant began working along side McCauley as opposed to under her supervision. (R. Vol. II, p. 48-9). They were both supervised by Kay Harrison who reported to their Manager, Tom Woodling. (R. Vol. II, p. 48-9). Plant and McCauley were cross trained and they fulfilled essentially the same responsibilities. (R. Vol. II, p. 98-100).

Throughout 1990, 1991, and 1992, Plant continued to get raises and the same overall rating as McCauley; that of a "3". (R. Vol. II, p. 50-2). However, she began to receive comments on her evaluations accusing her of being occasionally late and as having problems communicating. (R. Vol. II, p. 50-1). Plant who had maintained a perfect attendance record denied having a problem being late. (R. Vol. II, p. 50-1). During depositions it was discovered that it was not her supervisor who had been keeping track of Plant's alleged tardiness, but McCauley, her co-worker. (R. Vol. II, p. 217-8, 291-6). Plant was not notified when she was

believed to be tardy. (R. Vol. II, p. ____). And she was never written up except during her evaluations. (R. Vol. II, p. _____). In the end Plant was accused on the basis of a calendar maintained by McCauley of being late for unknown lengths of time over 80 times during her last year of employment. (R. Vol. II, p. 217-8, 291-6). Having only copies of the calendar, Plant requested of McCauley during her deposition the whereabouts of the original calendar and was informed by McCauley that her file on Plant had disappeared. (R. Vol. II, p. ____).

In March, 1991 Plant was informed out of the blue by Kay Harrison that she was finally being promoted to a labor grade 23 because she was doing a good job and deserved it. (R. Vol. II, p. 51). She received a 5% increase in pay. (R. Vol. II, p. 51). In 1992 she received another 4% increase in pay; the same as McCauley. (R. Vol. II, p. 51, 388).

In August, 1992 Plant was evaluated again. This time in addition to the comments regarding her alleged inability to communicate and her alleged tardiness problem, Plant was encouraged in her evaluation to learn more in-depth details about her job. (R. Vol. II, p. 497). Plant was still given an overall rating equal to McCauley, that of a "3". (R. Vol. II, p. 226, 388, 497).

During 1992, Vought continued to go through a reorganization and reduction in force. (R. Vol. 2, p. 92). In determining which salaried employees are to be laid off, Vought is to follow Policy S.P.A. 214.1, Sec. 16 which states performance, seniority, and critical skills are the primary factors to be considered. (R. Vol. II, p. 368). It further states, that seniority is the governing factor when performance and critical skills are "essentially equal" to other departmental employees in the same classification or other employees in the same job ladder. (R. Vol. II, p. 368).

When an employee such as Plant who has more then 20 years seniority is recommended for layoff, another position is to be sought out, and if no such position can be located

then the decision must be substantiated and approved by the President of Vought. (R. Vol. I, p. 107-8, 112-22).

In implementing this policy Vought prepared Employee Ranking Charts which included categories for each employee's age, seniority, and salary, as well as, one for merit increases received, performance ratings, gender and race. (R. Vol. II, p. 60-2, 114-121, 385, 388). Woodling was unable to give an explanation for the necessity of this extra information during his deposition. (R. Vol. II, p. ____).

Plant was stacked with McCauley since they were doing the same job. (R. Vol. II, p. 114-121, 388). McCauley was 12 years older then Plant. (R. Vol. II, p. 388). McCauley had 12 years seniority compared to Plant's 26. (R. Vol. II, p. 388).

On October 19, 1992 Plant was recommended by Harrison, Woodling, and Mike Byrum for layoff. (R. Vol. II, p. 391). In the recommendation which had to be approved by the President of Vought, Plant was accused of needing to be "spoon fed", that she exhibited an extremely limited capacity for taking on new and more complex tasks, that she was unwilling to take on any initiative to increase her base knowledge of her current tasks, and that the work load in her organization had been disturbed trying to find work she could perform. (R. Vol. II, p. 391).

At or around the same time James Hendricks, a younger male co-worker of Plant's with 7 years less seniority, was transferred to a scheduling position that was available. (R. Vol. II, p. 54, 326-7, 385). The position he described in his deposition was the same type of job Plant had held while she was in scheduling. (R. Vol. II, p. 54, 327-9). Hendricks testified he had no prior experience in scheduling work. (R. Vol. II, p. ____).

Vought stated in interrogatory responses that Plant was not considered for this position because the job required someone with 1) high proficiency computer skills, 2) good communication skills, and 3) someone who was dependable.

(R. Vol. II, p. 64-5). Hendricks' evaluations at the time show he was marked as needing improvement in "customer focus", "initiative" and "communications". (R. Vol. II, p. 392-407). He was given the same overall evaluation as Plant, that of a "3". (R. Vol. II, p. 385, 392-407).

On November 12, 1992, Smith and Woodling provided a memo to Human Resources stating their reasons why Plant should not be considered for a position within the secretarial pool. (R. Vol. II, p. 390). The reasons given were Plant's alleged continual tardiness and her "attitude" when placed in the pool in 1990. (R. Vol. II, p. 390). It was also stated that since she had not been a secretary for the last six years she would require "extensive" training to learn WordPerfect, All-in-One, and MultiMate, and was therefore, "obsolete." (R. Vol. II, p. 390). Vought's own records show Plant had taken the course in All-in-One and MultiMate, as well as another called Freelance Plus in 1990. (R. Vol. II, p. 503). When confronted with this information during his deposition, Smith changed his statement and explained Plant may have taken the courses, but she did not know how to use them as evidenced by her inability to handle the assignments she was given while in the pool in 1990. (R. Vol. II, p. 356-58). McCauley testified, however, that Plant had only been given one assignment and that it was not a secretarial position while she was in the pool in 1990. (R. Vol. II, p. 290, 299-300).

In November, 1992 Plant was told by Woodling that she was being laid off. (R. Vol. II, p. 52-3).

Plant's immediate supervisor, Harrison, later contacted Plant at home and told her that she should contact the President of the company because she did not believe she had been treated fairly considering her performance and attitude on the job. (R. Vol. II, p. 53). At the time, Harrison voluntarily provided Plant with a written letter of recommendation stating she had a "good attitude" and was "very willing" to do anything it took to get the job done. (R.

Vol. II, p. 262, 480). Harrison testified at her deposition that she was not consulted in the decision to layoff Plant until after the decision had been made. (R. Vol. II, p. 212-4, 259-60). She also qualified what she meant in the letter of recommendation by saying Plant "tried her best." (R. Vol. II, p. 262).

Vought had an early retirement program that was in place at the time called "magic 85". (R. Vol. I, p. 109). Under that program an individual could take early retirement anytime after they turn 55 if their age and seniority total at least 85 points. (R. Vol. I, p. 109). Plant would have had the necessary magic 85 within 6 and 1/2 years of the date of her termination and could have quit although she would not have been able to draw her benefits until she turned 55. (R. Vol. II, p. 54). If Plant had not been terminated and had not taken early retirement, Vought could have potentially continued to make contributions for another 19 years. By terminating Plant Vought assured no further benefits would accrue and that no benefits would need to be paid for another 19 years. (R. Vol. I, p. 109).

Vought's management could easily determine from the dates of birth and dates of seniority provided on the Employee Ranking Charts that 1) Hendricks who was only 42 years of age had 19 years of seniority and would have had to wait at least 13 years before he could begin drawing early retirement since he would not have turned 55 until then, and 2) McCauley who was 58 years of age and had 12 years of seniority would have had to wait until age 65 to retire as her seniority and age would not have totaled 85 points until after she turned 65. (R. Vol. II, p. 385, 388).

STATEMENT OF JURISDICTION OF COURT OF APPEALS

The jurisdiction of the Court of Appeals for the Fifth Circuit was pursuant to 28 U.S.C. Sec. 1291.

ARGUMENT

I. TITLE VII AND ADEA CLAIMS:

A writ of certiorari should be granted in this case because the District Court and the Court of Appeals for the Fifth Circuit have decided the federal question of whether Plant was terminated on the basis of her age or gender in a manner that conflicts with this Court's rulings in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) and *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993), among others.

A. Standard on Review:

Under Rule 56(c) of the Federal Rules of Civil Procedure, the District Court was to consider the evidence presented and determine whether there was a genuine issue of material fact for trial. Fed. R. Civ. P. 56(c). In analyzing the evidence all inferences were to be drawn in Plant's favor. *See Matagorda County v. Russell Law*, 19 F.3d 215, 217 (5th Cir. 1994). On appeal the Fifth Circuit was to review the record de novo, applying the same standard used by the District Court. *Calpetco 1981 v. Marshall Exploration, Inc.*, 989 F.2d 1408, 1412 (5th Cir. 1993).

B. Procedural Structure in Title VII and ADEA Cases:

The District Court and the Court of Appeals both initially correctly laid out the law as regards the procedural frame work for proving a Title VII or ADEA claim. The plaintiff in these cases must first establish a prima facie case of

discrimination by a preponderance of the evidence. *St. Mary's*, 113 S.Ct. at 2747. By so doing, the plaintiff creates a presumption of discrimination which the employer must then rebut by articulating a legitimate, nondiscriminatory reason for the employee's termination. *Id.*

In the instant case, Plant contends she has presented evidence that she was qualified for an available scheduling position which was given to a younger male, thereby establishing a prima facie case under both the ADEA and Title VII. The District Court assumed without deciding that Plant had proved a prima facie case. The Court of Appeals determined it did not need to decide whether Plant had established a prima facie case.

In response Vought has given as its legitimate, nondiscriminatory reason for Plant's termination the fact that it was going through a reduction in force and that Plant was not qualified for any other position. Once an employer articulates a nondiscriminatory reason for its actions, the plaintiff's burden of persuasion requires that the employee *ultimately prove* the reasons stated were merely pretexts for discrimination. *Id.* It has been well established that an employee can *prove* pretext "either by showing: (1) that a discriminatory reason more likely motivated the defendant or (2) that the defendant's reason is unworthy of credence." *Britt v. The Grocers Supply Co., Inc.*, 978 F.2d 1441, 1450 (5th Cir. 1992) (citing *Burdine*, 450 U.S. 248, 253-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981)). However, in order to overcome a summary judgment as in the instant case, an employee need not actually *prove* pretext, but must only show there is a genuine issue of material fact regarding pretext. *See Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095.

Plant would contend she has without doubt created a genuine question of fact as to whether Vought's explanations for why she did not get the personnel administrator's position, the scheduling position, and most especially the secretarial pool position, were pretexts for discrimination. Plant argued

that since she had held the same positions as those who received these job and had more seniority, her critical skills were arguably *essentially equal*. Plant argued that since she received the same overall ratings and merit increases, her performance was *essentially equal*. And since she had more seniority, she has argued she was entitled to one of these jobs according to Vought's policy. Plant argued the failure of Vought to follow its policy was evidence of pretext. *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13 (7th Cir. 1987).

As further evidence of its failure to follow its own policy, Plant pointed out numerous inconsistencies in the testimony of her supervisors as to why she was not placed in the secretarial pool instead of being terminated. While Vought argued at the time of her termination that she should be laid off because she had a tardiness problem, Plant denied having such a problem; showed any alleged tardies were recorded by her co-worker, McCauley, not her supervisor; testified that she was never warned about these tardies except during her evaluations even when she was allegedly late over 80 times in one year; and questioned the lose of the original calendar on which these alleged tardies were maintained. Plant pointed out that she was turned down for the secretarial position because she would allegedly need extensive training in some word processing packages, but that Vought's own records showed she had already had the necessary training the these courses, and that during her career it had been necessary for her to learn several software packages much more complicated then a word processing package. The evidence was clear that Plant was qualified for a secretarial position, had held such a position for 11 years, had the training she would need, and was capable of learning a word processing package if she in fact had to. In short she was hardly "obsolete" as a secretary as Vought alleged. Plant pointed out that she did not have a bad attitude as she was accused of having by presenting the letter of recommendation from

Harrison saying the exact opposite. The only testimony regarding a bad "attitude" relates to her complaints to Garner in 1990 which were perceived and recorded as being threats to pursue an EEO claim. Plant presented evidence that Vought's management was surprised to find Plant had copies of these records. Plant presented evidence that she was not assigned to numerous secretarial positions in 1990 and that she did not receive poor recommendations from those she was assigned to as Smith had alleged.

Finally, Plant presented evidence that Employee Ranking Charts were prepared which contained information regarding the employee's age and gender that was not necessary for the determination of who to keep and who to terminate during the reduction in force. *See Herman v. National Broadcasting, Co., Inc.* 744 F.2d 604 (7th Cir. 1984) (responsible corporate decision maker had elicited a list of employees potentially affected by a reduction in force due to changes in technology with a category for date of birth). No explanation was given by Vought for the need of this information.

In short, Plant created a genuine issue of fact as to whether the reasons given by Vought for why she was not retained were worthy of credence. The District Court basically acknowledged the fact that Plant had created a question regarding the credence of Vought's explanations, but then went on to state:

> Even if Plant's assertions regarding the credence of Vought's explanations are true, she has failed to present a genuine issue of material fact regarding pretext. Plant must do more than suggest that Vought's proffered reasons for her termination are false; she must raise a genuine issue of material fact that Vought's proffered reasons are a pretext for prohibited *discrimination*. *See St. Mary's Honor Center v. Hicks*, above, ____ U.S. ____, 113 S.Ct. at 2752. Plant has made no such showing and, for this reason, Vought is entitled to summary

judgment on her Title VII and ADEA claims. *See Bodenheimer*, above, 5 F.3d at 959.

See Appendix A, p. 8.

It is here that the District Court conflicts with this Court's rulings in *St. Mary's*, *Burdine*, and *McDonnell Douglas*. By making the holding it did the District Court in the instant case improperly attempts to hold Plant to her *ultimate* burden of persuading the factfinder that Vought's reasons were a pretext for discrimination, rather to her summary judgment burden of creating a genuine issue of pretext

It is true Plant must ultimately prove that the articulated reasons given by Vought were pretexts for discrimination, however the factfinder has always been able to infer the ultimate fact of discrimination from its disbelief of the reasons given by the employer together with the elements of a prima facie case. *St. Mary's*, 113 S.Ct. at 2749. *St. Mary's* only held that a court can not mandate a finding of discrimination as a matter of law when the factfinder has only rejected the employer's articulated reason as non-credible, and failed to find the motivation was discriminatory. 113 S.Ct. at 2746. *St. Mary's* in now way changed the burden as previously set out in *McDonnell Douglas* or *Burdine*.

In addressing the potential for confusion on this point, this Court very clearly and succinctly stated its findings in *St. Mary's* as follows:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination[4], and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required*," 970 F.2d at 498 (emphasis added). But the

> Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion." (cites omitted).

Id. The Supreme Court went further in its attempt to avoid any confusion over what a plaintiff's burden is suppose to be in a discrimination case when it stated the following:

> Contrary to the dissent's confusion-producing analysis, *post*, at 2761-2762, there is nothing whatever inconsistent between this statement and our later statements that (1) the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason," *infra*, at 2752, and (2) "it is not enough . . . to disbelieve the employer," *infra*, at 2754. Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination*.

Id. at n. 4.

It is clear the District Court was in direct conflict with this Court when it required Plant do more then create a question of fact as to the credence of Vought's articulated reasons at the summary judgment level since according to this Court's rulings in *St. Mary's, McDonnell Douglas,* and *Burdine* a jury could have concluded from this evidence and that used to create a prima facie case that Vought's intent was to discriminate. 113 S.Ct. at 2748-9.

On appeal the majority panel for the Fifth Circuit Court of Appeals totally ignored Plant's argument as set forth above and simply found on its own that Plant failed to create a genuine issue of fact as to pretext on her ADEA and Title VII claims.[1] In doing so the Court of Appeals improperly

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1 Judge King of the Fifth Circuit agreed with Plant and rendered

drew several inferences against Plant. For example, it found the simple fact that two employees worked in the same position does not necessarily mean that they possess the same critical skills, and that Plant failed to *prove* her allegation. Appendix B, p. 8. Plant would contend first that she need not have proved she had the same critical skills, only that she had *essentially equal* skills, and second that she need not have *proved* this fact at all, but need only have created a genuine question of fact. A jury could then make its own conclusions. Another example of the Court of Appeals drawing inferences against Plant was when it stated it did not follow from the fact that she had received the same evaluation rating as Hendricks and McCauley that she had essentially the same performance. Appendix B, p. 7. The point is a jury could come to this conclusion, especially considering the Employee Ranking Chart which was created for comparison purposes during the reduction in force showing identical performance evaluation ratings and making no reference to any subtle differences between the comments on the evaluations. Another example of an improper inference being drawn against Plant is when the Court of Appeals concluded the mere fact that she was arguably qualified for a position as a secretary and Vought failed to transfer her into said position does not lead to the factual or legal conclusion that Vought was discriminating against her based on her age or gender. Appendix B, p. 8. Again the Court of Appeals misses the point. Plant not only created a genuine issue of fact as to whether she was qualified for a secretarial position contrary to Vought's claims, but also that Vought lied about Plant's qualifications when it claimed she was obsolete as a secretary. There is a question about whether Vought lied when it said she did not have the training necessary for this position and that she was incapable of

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a separate dissenting opinion stating he believed Plant had created a genuine issue of fact as to whether she was terminated by reason of discrimination based on her sex or age. Appendix B, p. 11.

learning the word processing packages that were being used. There is a question about whether Vought lied when it said she had an attitude problem. If there is a question about whether Vought lied about these things then there is a question as to Vought's motivations. There is a question as to whether Plant's 1990 perceived threat to file an EEO complaint was the basis for Vought's claim that Plant had a bad "attitude." The existence of these questions all served as the basis for Plant's claim she had created a genuine issue of fact as to whether Vought's explanations for why she was not placed in the secretarial pool were unworthy of credence. As such, Plant created a fact issue as to pretext sufficient to get to a jury. *See St. Mary's,* 113 S.Ct. at 2749.

The Court of Appeals summarized its finding as to Plant's ADEA and Title VII claims as follows:

> In short, Plant has made largely unsupported allegations. She contended basically that because she was qualified for some position with Vought, then her termination must necessarily be discriminatory, and any reason to the contrary asserted by Vought must be a pretext for this discrimination.

Appendix B, p. 9. Plant does not and has not argued that any explanation Vought might have given for why she was not retained would be a pretext for discrimination. She does, however, argue that she has created a genuine issue of fact as to whether the specific explanations actually given by Vought, especially as regarding the secretarial position, were worthy of credence. She would strenuously argue at the very least it is not credible that Vought would argue that someone who had the skills necessary to take on assignments far beyond those of a secretary, who had been a secretary for 11 years out of her 26 years of employment with the company, who had only been away from secretarial duties for the last six years of her employment, and who had the training required to be a secretary, was "obsolete" as a secretary and incapable of learning a simple word processing program.

The Court of Appeals, like the District Court, has effectively required Plant do more then simply create a question as to whether Vought's explanations for her termination are worthy of credence and has attempted to require her to show further evidence that Vought's reasons are a pretext for discrimination based on age or sex. See Appendix B, p. 9. This is in conflict with this Court's finding in *Burdine* which held that an employee could prove pretext by showing either that the employer was motivated by a discriminatory reason or by showing the employer's reasons is unworthy of credence. 450 U.S. 248, 253-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981). It was also in conflict with this Court's decision in *St. Mary's* that a factfinder could conclude from the prima facie case and its disbelief of the employer's reason alone that the employer was motivated by discriminatory reasons. 113 S.Ct. at 2749. Finally, the Court of Appeals decision was in conflict with this Court's findings in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970) which requires the courts to view the evidence while considering a motion for summary judgment in the light most favorable to the non-movant.

II. ERISA CLAIMS:

Plant's ERISA claims were dismissed on the basis that Plant failed to present any evidence that Vought had a specific intent to interfere with her retirement benefits. Appendix A, p. 5; Appendix B, p. 11. Plant would contend she has presented sufficient evidence, albeit circumstantial evidence, of Vought's specific intent to interfere with her benefits in the same manner in which she created a genuine issue of fact as to whether Vought had a specific intent to discriminate against her based on her age and gender. She has created a genuine issue of fact as to whether Vought's explanation for terminating her is worthy of credence and as such she has created a genuine question as to why she was terminated. It

was for the jury that was demanded in this case to determine ultimately whether Vought was motivated by any a desire to interfere with Plant's benefits, was based on her age or gender, or some combination of the three. The evidence shows Vought saved the most money by terminating Plant, as opposed to McCauley or Hendricks. Not only did it save the contributions it would have made over the next 6 and 1/2 years before Plant would have been eligible for early retirement, but it also postponed having to pay any benefits at all for another 19 years. If Vought had terminated McCauley all it would have saved would have been the next 7 years of contributions made before she turned 65 since it would have had to begin paying retirement benefits at that time anyway. Likewise, no matter what it did with regard to Hendricks it would not have to begin paying out benefits for another 13 years which would have been the earliest he could have taken an early retirement. These facts, taken together with the existence of the Employee Ranking Charts which provided the information necessary to compare the employees in this manner when these facts were not necessary for determining who should be laid off, all tend to point to the specific intent to interfere with Plant's benefits.

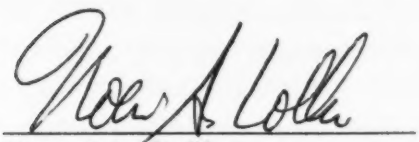
This Court should grant writ of certiorari in this case in order to set out the procedural structure needed to show the specific intent necessary to prove a claim under ERISA, and to more fully address what evidence will suffice to show specific intent.

CONCLUSION

Plant moves this Court to grant her writ of certiorari and to reverse and remand the judgment of the Court of Appeals and District Court.

Respectfully submitted,

Noemi A. Collie
Attorney at Law
434 W. 12th Street
Dallas, Texas 75208
(214) 942-6812
(214) 942-6818 (fax)



Noemi A. Collie

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CAROL PLANT,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CIVIL ACTION NO.
	)	
VOUGHT AIRCRAFT COMPANY,	)	3:93-CV-1665-G
	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

Before the court is the motion for summary judgment[1] (the "motion") of defendant Vought Aircraft Company ("Vought"). For the reasons stated below, the motion is granted.

I. BACKGROUND

This action arises from Vought's decision to terminate the employment of plaintiff Carol Plant ("Plant"). Plant was hired by Vought in November, 1966. Memorandum in Support of Motion of Defendnant Vought Aircraft Company for Summary Judgment (the "memorandum") - Affidavit of T.F. Woodling, Jr. (the "Woodling Affidavit") ¶ 4; Plaintiff's Responses to Defendant's Motion for Summary Judgment (the

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1 The court notes that defendant's motion for summary judgment and plaintiff's response thereto fail to comply with Local Rule 5.2(a) of the United States District Court for the Northern District of Texas.

"response") ¶ 2. *See* Plaintiff's Original Complaint and Jury Demand (the "complaint") ¶ 5. After several changes in position, Plant was ultimately promoted to Planning Engineer. *See* Complaint ¶¶ 2-9; Woodling Affidavit ¶ 4. Plant remained in that position until she was informed of her layoff in November 1992. Response ¶ 30; Woodling Affidavit ¶ 4. Plant filed this suit alleging that Vought discriminated against her (1) on the basis of sex, in violation of 42 U.S.C. Sec. 2000e *et seq.* ("Title VII"); (2) on the basis of age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. Sec. 621 *et seq.* (the "ADEA"); and (3) in violation of Sec. 510 the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sec. 1001 *et seq.* Complaint ¶¶ 1, 13.

II. LEGAL STANDARD

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).[2] "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The movan makes such a showing by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issues. *See Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant makes this showing, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial.

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2 The disposition of a case through summary judgment "reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Company*, 780 F.2d 1190, 1197 (5th Cir. 1986).

Id. at 323-24. To carry this burden, the opponent must do more than simply show some metaphysical doubt as to the material facts. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586 1986). Instead, she must show that the evidence is sufficient to support a resolution of the factual issue in her favor. *Anderson*, 477 U.S. at 249. All of the evidence must be viewed, however, in the light most favorable to the motion's opponent. *Id.* at 255 (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). Summary judgment is properly entered against a party if after adequate time for discovery, she fails to establish the existence of an element essential to her case and as to which she will bear the burden of proof at trial. *Celotex*, above, 477 U.S. at 322-23.

III. ANALYSIS

A. Plant's ERISA Claim

Section 510 of ERISA prohibits an employer from discharging or discriminating against an employee for "the purpose of interfering with the attainment of any right to which such participant may become entitled under the [ERISA] plan." 29 U.S.C. Sec. 1140 ("section 1140"). To recover under this section, Plant "need not show that 'the *sole* reason for [her] termination was to interfere with pension rights'; however, [she] must show that the employer had the 'specific intent to violate ERISA,'" *Clark v. Resistoflex Company*, 854 F.2d 762, 770 (5th Cir. 1988) (quoting *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3rd Cir.) *cert. denied*, 484 U.S. 979 (1987)) (emphasis in original).

To support her ERISA claim, Plant alleges that she "lacked six years before she would be 100% vested in [Vought's retirement and pension plan . . . [and] lacked 13 out of 85 points before she would have been 100% vested." Complaint ¶ 7. Plant further states:

> [O]ne of the determining factors causing her lay off was [Vought's] desire to deprive [her] of further participation in [Vought's] pension plan and to avoid the adverse

> economic impact which [her] continuation inthe plan would cause. The aforesaid discrimination was for the purpose of interfering with [Plant's] attainment of rights to which she would have become entitled to [sic] under [Vought's] pension plan. . . . .

Id. ¶ 14.

Further submissions indicate that Plant was fully vested at the time she was terminated and now complains that her termination interfered with her alleged right to accrue additional benefits under Vought's "Magic 85" early retirement program. Motion of Defendant Vought Aircraft Company for Summary Judgment (the "motion") ¶¶ 31-37; Memorandum at 5-6, 13-14; Affidavit of G. A. Barfield (the "Barfield Affidavit") ¶ 8. *See* Response ¶ 56 (failing to dispute Vought's assertion that Plant was fully vested at the time of her termination).

For purposes of this memorandum order, the court assumes, without deciding, that Plant has stated a claim for relief under section 1140.[3] Still, Plant fails to raise a genuine issue of material fact regarding Vought's specific intent to violate ERISA when it terminated her. Although "[Plant is] entitled to have reasonable inferences drawn in [her] favor, the inferences to be drawn 'must be rational and reasonable, not idle, speculative, or conjectural.'" *Unida v. Levi Strauss & Company*, 986 F.2d 970, 980 (5th Cir. 1993) (citation omitted). As in *Unida*, it would be speculative to infer that Vought "intended to interfere with [Plant's] entitlement to ERISA benefits from the evidence proffered by [Plant] in support of [her] claim . . . . " *Id.* Accordingly, Vought's motion for summary judgment on this claim must be granted.

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3 Contrary to Vought's assertion, *Clark v. Resistoflex Company*, 854 F.2d 762, 771 (5th Cir. 1988), expressly declined to decide whether section 1140 supports a claim for an alleged loss of an opportunity to enhance vested pension rights. *See* Memorandum at 15.

See Memorandum in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment (the "Plaintiff's Memorandum") at 12-14. *Accord Perdue v. Burger Kind Corporation*, 7 F.3d 1251, 1255 (5th Cir. 1993) (summary judgment was proper where the plaintiff "failed to point to specific facts which indicate that . . . [the employer] terminated [the plaintiff's] employment with the specific intent of interfering with [plaintiff's] attainment of rights under the [ERISA plan]").

B. Plant's ADEA and Title VII Claims

For purposes of this memorandum order, the court assumes, without deciding, that Plant has established a *prima facie* case under Title VII and the ADEA. *See McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802 (1973); *Hanchey v. Energas Company*, 925 F.2d 96, 97 (5th Cir. 1990); *Thornbrough v. Columbus and Greenville Railroad Company*, 656 F.2d 633, 642 (5th Cir. 1985); *Williams v. General Motors Corporation*, 656 F.2d 120, 128-30 (5th Cir. 1981) *cert. denied*, 455 U.S. 943 (1982). The establishment of a *prima facie* case raises a rebutable presumption of discrimination. *McDonnell Douglas*, 411 U.S. at 802; *Thornbrough*, 760 F.2d at 646. The burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions.[4] *McDonnell Douglas*, 411 U.S. at 802; *Thornbrough*, 760 F.2d at 639. If the employer fails to meet this burden of production, the factfinder is required to find for the plaintiff. *Thornbrough*, 760 F.2d at 639. However, if the employer articulates legitimate reasons for its decision, the employer successfully rebuts the presumption and the burden of production shifts to

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[4] The burden of persuasion, however, remains with the plaintiff throughout the case. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Amburgey v. Corhart Refractories Corporation, Inc.*, 936 F.2d 805, 811 n. 18 (5th Cir. 1981) (citation omitted).

the plaintiff to prove that the reasons given by the employer are pretextual. *See McDonnell Douglas*, 411 U.S. at 804; *Thornbrough*, 760 F.2d at 646. The plaintiff can prove pretext "'either by showing that a discriminatory reason motivated the defendant or by showing that the proffered reason is unworthy of credence.'" *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 467 (1993) (quoting *Hanchey*, above, 925 F.2d at 98). *See McDonnell Douglas*, 411 U.S. at 804-05. Proving the falsity of the proffered reason for termination, however, is not enough. *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2752 & n.6 (1993). The plaintiff must establish that the reason offered is a pretext *for discrimination*. *Id.* ("[A] reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false *and* that discrimination was the real reason") (emphasis in original). *See also Moore*, 990 F.2d at 815-16; *Hanchey*, 925 F.2d at 98; *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 957 n.4 (5th Cir. 1993) (the "Fifth Circuit . . . has adopted the *St. Mary's* procedural roadmap for ADEA cases").

To discharge its burden of articulating a legitimate, nondiscriminatory reason for terminating Plant, Vought asserts it was experiencing a "business downturn due to the decreasing number of orders for commercial and military aircraft" which "resulted in numerous layoffs . . . " Motion ¶¶ 5-6. *See* Memorandum at 2; Woodling Affidavit ¶ 6; Barfield Affidavit ¶ 3; Plaintiff's Memorandum at 2 (stating that she "was displaced by a layoff"). In deciding to terminate Plant, Vought claims to have followed the procedures outlined in its company directive 214.1, ultimately concluded that Plant was not qualified to fill any remaining positions and determined that laying off Plant was appropriate. *See* Motion ¶¶ 7-13, 16-29; Memorandum at 2-5, 8-9; Barfield Affidavit

¶¶ 307; Attachment 1 to Barfield Affidavit (company directive 214.1); Woodling Affidavit ¶¶ 7-12, 15.

The reasons given by Vought for terminating Plant are legitimate and nondiscriminatory. *See Hanchey*, above, 925 F.2d at 98 (a reduction-in-force which led to the elimination of the plaintiff's position and the assumption of her duties by another corporate office constituted a legitimate reason for terminating the plaintiff); *Amburgey v. Corhart Refractories Corporation, Inc.*, 936 F.2d 805, 808-09, 813 (5th Cir. 1991) (the employer's explanation that it elected to terminate the plaintiff because he was not qualified to fill the remaining positions was legitimate and nondiscriminatory); *Bodenheimer*, above, 5 F.3d at 957-58.

Plant thus has the burden of demonstrating that Vought's proffered reasons for her termination are pretextual. In the context of summary judgment, however, the question is not whether Plant proves pretext, but whether she raises a genuine issue of material fact regarding pretext. *Thornbrough*, above, 760 F.2d at 646. To raise a genuine issue of fact regarding pretext, Plant

> must do more than 'cast doubt on whether [Vought] had just cause for its decision' . . . Specifically, there must be proof that age motivated [Vought's] action, otherwise the law has been converted from one preventing discrimination because of age to one ensuring dismissals only for just cause to all people over 40.'

Moore, 990 F.2d at 815-16 (quoting *Hanchey*, 925 F.2d at 99 and *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1508 n.6 (5th Cir. 1988)).

To this end, Plant generally attacks the veracity of Vought's proffered reasons for her termination. *See, e.g.*, Response ¶ 42 (disputing that Vought adhered to company directive 214.1 in determining that she should be terminated);

Plaintiff's Memorandum at 6.[5] *See generally id.* at 8-11, 12. Plant also claims that she "has created a genuine issue of fact as to whether the reason given by Vought for why she did not get the scheduling position is worthy of credence." *Id.* at 9. *See e.g., id.* at 10 ("Vought's attempt to paint Plant as being a totally incompetent employee when her record clearly shows that was not the case is more evidence its reason for not giving Plant the scheduling job is not credible").

Even if Plant's assertions regarding the credence of Vought's explanations are true, she has failed to present a genuine issue of material fact regarding pretext. Plant must do more than suggest that Vought's proffered reasons for her termination are false, she must raise a genuine issue of material fact that Vought's proffered reasons are a pretext for prohibited *discrimination*. *See St. Mary's Honor Center v. Hicks,* above, ___ U.S. ___, 113 S.Ct. at 2752. Plant has made no such showing and, for this reason, Vought is entitled to summary judgment on her Title VII and ADEA claims. *See Bodenheimer*, above, 5 F.3d at 959.

IV. CONCLUSION

For the reasons stated, Vought's motion for summary judgment must be GRANTED.

SO ORDERED.

May 24, 1994.

"s/A. Joe Fish"
United States District Judge

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5 Plant asserts:

> Even the smallest amount of research would have determined that Plant had already had most of the training they claimed she was lacking. There is no evidence that she had to be spoon fed in her position, and there was no evidence that she had an attitude problem. In fact she had recently earned a promotion.

Plaintiff's Memorandum at 6.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10579
Summary Calendar

CAROL PLANT,

Plaintiff-Appellant,

versus

VOUGHT AIRCRAFT COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Texas
(3:93-CV-1665-G)

Before Judges KING, JOLLY, and DeMOSS, Circuit Judges.
PER CURIAM:*

I.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

During November 1992, the defendant, Vought Aircraft Company ("Vought"), laid off Carol Plant, the plaintiff. At the time of her termination, Plant was forty-six years old and had been employed with Vought for more than twenty years. She began working for Vought as a clerk typist in November 1966 and was promoted to severarl different positions over the years. In early 1990, Vought temporarily transferred Plant to a secretarial pool and then to an engineering planning associate position, where she remained until she was laid off. Only one other employee, M. E. McCauley, was employed in the same position as Plant at the time she was laid off. McCauley is a female who is older than Plant.

Vought alleged that it was forced to reduce its work force due to a decrease in the demand for the commercial and military aircraft it manufactured. Vought's company directives state that it is to consider certain criteria--performance, seniority, and critical skills--when determining which employees will be laid off. Vought's policies provide for consideration of seniority as the controlling factor only when an employee's performance and critical skills are essentially equal to those of employees in the same classification. Furthermore, the policies state that Vought is to attempt to find the employee another position prior to being laid off.

After comparing the criteria listed in the company directives, Vought found that McCauley outranked Plant in performance and critical skills, making Plant's seniority irrelevant. As a result of the company downsizing, Vought contended that locating a position for which Plant was qualified was impossible. Because she ranked lower than McCauley pursuant to the company directives, Plant was laid off. At approximately the same time Plant was laid off, James Hendricks, one of Plant's younger, male co-workers, was awarded a position in the scheduling department. Many years earlier, Plant had worked in the scheduling department.

Plant filed this suit against Vought in the United States District Court for the Northern District of Texas. Plant alleged that she was wrongfully terminated (1) under Title VII of the Civil Rights Act of 1964 on the basis of her gender; (2) under the Age Discrimination in Employment Act ("ADEA") on the basis of her age; and (3) under the Employee Retirement Income Security Act ("ERISA") benefits. The court granted Vought's motion for summary judgment and dismissed Plant's complaint after finding Plant failed to demonstrate a genuine issue of material fact with regards to either her Title VII, ADEA, or ERISA claims. The court assumed, without deciding, that Plant established a prima facie case under Title VII and the ADEA. The court held, however, that she failed to show that Vought's legitimate, non-discriminatory reason for terminating Plant--company downsizing--was a mere pretext for discrimination. With respect to her ERISA claim, the court again assumed without deciding that Plant stated a claim under ERISA, but determined that Plant did not demonstrate, as she must, that Vought specifically intended to violate ERISA when it terminated her.

On appeal, Plant argues first that Vought's asserted reasons for her termination are a mere pretext for sex and age discrimination in violation of Title VII and the ADEA. Secondly, Plant argues that Vought terminated her with the specific intent to deprive her of early retirement benefits.

II.

We review a grant of summary judgment de novo, applying the same standard used by the district court. Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1412 (5th Cir. 1993). Under Rule 56(c) of the Federal Rules of Civil Procedure, we examine evidence presented to determine that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Once a properly supported motion for summary judgment is presented, the

burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). We must review "the facts drawing all inferences most favorable to the party opposing the motion." Matagorda County v. Russell Law, 19 F.3d 215, 217 (5th Cir. 1994).

A.

(1)

We have adopted the same procedural structure for approaching a claim under the ADEA as that used for a claim under Title VII. See Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 & n.4 (adopting "procedural roadmap" used in Title VII cases in ADEA cases). The Supreme Court established this procedure to allocate the burden of production and provide for the order of presentation of proof. St. Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2746 (1993) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). First, the plaintiff must establish a prima facie case of discrimination by a preponderance of the evidence. St. Mary's Honor Ctr., 113 S.Ct. at 2747. This creates a presumption that the employer unlawfully discriminated against the employee. Id. The defendant employer must then rebut this presumption by showing a legitimate, nondiscriminatory reason for the employee's termination.[1] Id. After the employer has met its burden of production, the plaintiff's burden of persuasion requires that the employee must prove that the employer's reasons were pretexts for the suffered discrimination. Id. The employee must prove that the employer's reasons were

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1 Only the burden of production shifts to the defendant, not the burden of persuasion. St. Mary's Honor Ctr., 113 S.Ct. at 2747. The burden of persuading the trier of fact that the employer illegally discriminated against the employee remains on the plaintiff. Id.

not the true reasons for the termination and that unlawful discrimination was. Bodenheimer, 5 F.3d at 957. The employee can prove that the reason asserted by the employer is pretext "either by showing: (1) that a discriminatory reason more likely motivated the defendant or (2) that the defendant's reason is unworthy of credence." Britt v. The Grocers Supply Co., Inc., 978 F.2d 1441, 1450 (5th Cir. 1992) (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981)).

(2)

Essentially the same elements necessary to maintain a Title VII action are required in an ADEA claim. Frazier v. Garrison Indep. Sch. Dist., 980 F.2d 1514, 1527 (5th Cir. 1993). For this reason we will consider these claims together. "It is relatively easy both for a plaintiff to establish a prima facie case and for a defendant to articulate a legitimate, non-discriminatory reason for his decision." Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 811 (5th Cir. 1991). We agree with the district court that Plant failed to submit factual evidence that would lead a reasonable jury to conclude that Vought's reasons are a pretext for discrimination. Bodenheimer, 5 F.3d at 958; see Burdin, 450 U.S. at 256, 101 S.Ct. 1095 (stating plaintiff need not prove pretext to overcome motion for summary judgment, but must demonstrate genuine issue of material fact regarding pretext). Consequently, we need not decide whether Plant has established a prima facie case of discrimination under either Title VII or the ADEA.[2] Britt v. The Grocers Supply Co., Inc., 978 F.2d 1441, 1450 (5th Cir. 1992).

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2 Under Title VII, the plaintiff must prove a prima facie case of discimination by showing (1) the plaintiff is a member of a protected group; (2) the plaintiff was qualified for the job that was held; (3) the plaintiff was discharged; and (4) after the employer discharged the plaintiff, the employer filled the position with a person who is not a

As a legitimate, non-discriminatory reason, Vought asserted that it was experiencing a business downturn due to a decrease in aircraft orders which resulted in a number of layoffs. Vought argued that because Plant was not qualified to fill any remaining position, she was laid off. We find Vought's alleged reasons for terminating Plant to be legitimate and non-discriminatory. See Hanchey v. Energas Co., 925 F.2d 96, 97 (5th Cir. 1990) (finding legitimate a reduction-in-force leading to the elimination of the plaintiff's position); Amburgey, 936 F.2d at 808-09, 813 (finding legitimate explanation of termination that employee was not qualified for any position within company).

Plant argued, however, that Vought's reasons for terminating her rather than either leaving her in the remaining position given to McCauley, transferring her to the scheduling position given to Hendricks or transferring her into the secretarial pool, were a mere pretext for discrimination.[3] In determining which employees are to be laid off, Vought considers an employee's "performance, seniority and critical skills," pursuant to a specific procedure set forth in its company policies. Seniority is the governing factor only when the employee's performance and critical skills are essentially equal to those of other employees in the same classification.

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member of the protected group. Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592, 596 (5th Cir. 1992). To prove a prima facie case of age discrimination under the ADEA, the plaintiff must show that he (1) was discharged; (2) was qualified for the position; (3) was within the protected class at the time of discharge; (4) was replaced by someone outside the protected class, or (5) by someone younger, or (6) show otherwise that his discharge was because of his age. Hornsby v. Conoco, Inc., 777 F.2d 243, 246 (5th Cir. 1985) (citing Elliott v. Group Medical & Surgical Serv., 714 F.2d 556, 565 (5th Cir. 1983)).

[3] Plant concedes, in her brief to this court, that "Vought has in fact articulated a legitimate, non-discriminatory reason by stating [she] was terminated because of a reduction in force," but argues that this reason is a pretext for discrimination.

Vought then used these factors to rank the employees in the Employee Ranking Charts and terminated the lowest scoring employees. Vought's termination policy provided, however, that prior to terminating an employee, the company would first attempt to find the employee another position. In short, Plant alleged that Vought discriminated against her by terminating her employment with the company rather then placing her in another position for which she was qualified, as provided in the company's policies.

Plant makes several, unconvincing arguments that Vought's reasons for her termination were a mere pretext for discrimination. She principally argued that Vought's failure to follow its termination policy proved pretext. Plant contended that because her performance and critical skills were essentially equal to those of McCauley and Hendricks, her seniority entitled her to either co-worker's job.[4] Plant argued only that because she received the same numerical rating as both McCauley and Hendricks on the past two evaluations,[5] they must have rendered essentially equivalent performances. Vought introduced evidence that Plant was ranked lower on the stacking report than McCauley because her performance evaluations reflected negative marks in communication skills and attendance. To the contrary, McCauley's evaluations exhibited only positive remarks concerning her increased responsibility and ability to perform her job. Vought also submitted evidence showing that Hendricks was classified in a higher "labor grade"[6] than Plant and that the scheduling job given to Hendricks required the skills of a person in this

---

4 Plant, undoubetdly, had more seniority than either McCauley or Hendricks at the time of her termination.

5 All three employees were given class three ratings on their past evaluations.

6 When an employee is rated a higher labor grade than another, he is expected to meet a higher level of performance and accordingly receives a higher level of pay.

higher "labor grade." Additionally, Plant argues that she had essentially equivalent "critical skills" as those of Hendricks and McCauley because she held at one time, the same position as Hendricks and McCauley. The simple fact that two employees work in the same position, however, does not necessarily mean that they possess the same critical skills. Plant failed to produce any evidence proving this allegation. Consequently, consideration of Plant's seniority in comparison to that of McCauley and Hendricks was unnecessary, as provided in Vought's policies, to determine who to terminate. Plant has therefore failed to prove, by finally pointing to her greater seniority, that Vought's reasons for terminating her were pretexts for age and sex discrimination. Plant also contended, however, that Vought failed to follow its termination policy by refusing to give her a position for which she was qualified in the secretarial pool. Plant argued that she was qualified for a position in the secretarial pool because she had previously learned many of the software packages that she would use as a secretary.[7] Solely because Plant arguably was capable of performing the tasks of a secretary, does not lead to the factual or legal conclusion that unless Vought transferred Plant to this pool, it was discriminating against her on the basis of sex or age.

Additionally, Plant considered that Vought's use of Employee Ranking Charts, which contained categories for age, gender, and race, was direct evidence of discrimination. We disagree. Inclusion of these categories together with the other essential criteria listed in the company policies, does not alone raise a genuine issue of material fact with regard to pretext. In fact, McCauley, who was older than Plant, was

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[7] Vought, however, summarized Plant's former effort in the secretarial pool by stating, "Plant did not have the computer skills necessary to work as a secretary, she did not learn those skills, nor did she have the attitude necessary to learn the job."

included on the ranking charts, but nevertheless was retained with the company. Finally, Plant argued that since she made statements two years ago to the effect that she would be one to file a complaint with the EEOC, her yearly evaluations changed. Plant has submitted no evidence in support of this allegation and has shown no connection between this event, which occurred two years ago, and her layoff.

In short, Plant has made largely unsupported allegations. She contends basically that because she was qualified for some position with Vought, then her termination must necessarily be discriminatory, and any reason to the contrary asserted by Vought must be a pretext for this discrimination. As far as the ADEA is concerned, however, Vought is free to replace Plant with anyone it feels would better perform the job, even though Plant's performance may be adequate, so long as its decision is not illegally motivated. Elliot v. Group Medical & Surgical Serv., 714 F.2d 556, 567 (5th Cir. 1983). In sum, Plant has failed to produce sufficient evidence to raise a genuine issue of material fact as to whether Vought's reasons are pretexts for sex and age discrimination.

B.

Plant next contends that she was terminated with the specific intent to deprive her of early retirment benifits in violation of section 510 of ERISA. This provision makes it unlawful

> for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan,..., or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

Employee Retirement Income Security Act, Sec. 501, 29 U.S.C. Sec. 1140 (1985). To recover under section 510 of ERISA, the plaintiff need not show that "the sole reason for

his termination was to interfere with pension rights," but must show that the employer had a "specific intent to violate ERISA." Clark v. Resistoflex Co., 854 F.2d 762, 770 (5th Cir. 1988); see Unida v. Levi Strauss & Co., 986 F.2d 970, 979-80 (5th Cir. 1993) (finding well-settled within this circuit that plaintiff must show employer's specific intent to interfere with pension benefits). Without this required showing of intent, summary judgment is appropriate in favor of the employer. Simmons v. Willcox, 911 F.2d 1077, 1082 (5th Cir. 1990).

Vought offered its employees an early retirement program entitled the "magic 85" program.[8] It is undisputed that Plant would have become eligible under this early retirement program if she remained employed until January 1, 2001 or approximately seven additional years from the time of her termination with Vought. Under the general retirement plan, Plant will become eligible for benefits at age sixty-five or approximately nineteen years from the date of her termination. Plant deduces, therefore, that Vought's actions were motivated by a specific desire to prevent her from becoming eligible for early retirement.

To support its motion for summary judgment, Vought asserted that the reason it terminated Plant was a business downturn due to the unexpected decrease in aircraft orders and Plant's low rank among the other employees. To refute Vought's motion for summary judgment, Plant asserted essentially the same arguments made to prove Vought's reasons for terminating her were pretexts for discrimination in violation of Title VII and the ADEA.[9] She additionally

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8 Under the "magic 85" program, an employee may begin receiving early retirement benefits when he reaches age fifty-five and the total of his age plus his years of seniority is at least eighty-five.

9 We find these arguments unconvincing to prove Vought's intent under her ERISA claim for the same reasons we gave above when argued to prove pretext.

presented evidence that the employee ranking charts contained each employee's age and seniority, allowing Vought to easily determine an employee's time remaining with the company to qualify for the "magic 85" program. Thus, Plant argued that the sole existence of this information on the charts created a genuine issue of material fact regarding Vought's motivation.

We find unpersuasive Plant's attempts to create a genuine issue of material fact. Plant has failed to point to specific facts supporting the inference that Vought specifically intended to interfere with her rights to qualify for early retirement. See Perdue v. Burger Kind Corp., 7 F.3d 1251, 1255 (5th Cir. 1993) (finding that claim under section 510 failed without specific facts indicating intent to interfere). The evidence presented by Plant to support her contention that Vought's motivation in terminating Plant was to interfere with her pension rights supports only speculative conclusions. Such evidence is not sufficient to defeat Vought's motion for summary judgment. We AFFIRM the decision of the district court dismissing Plant's claim of violation of ERISA.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

KING, Circuit Judge, concurring in part and dissenting in part:

I agree with the panel majority that the plaintiff has failed to raise a genuine issue of material fact with respect to her claim that she was terminated in violation of ERISA. I disagree with the panel majority's conclusion that the plaintiff has failed to raise a genuine issue of material fact with respect to whether she was terminated by reason of discrimination based on her sex or, more likely on this record, her age. I would remand for trial on the Title VII and ADEA claims.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10579

CAROL PLANT,

Plaintiff-Appellant,

versus

VOUGHT AIRCRAFT COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 11/30/94, 5 Cir., _____, _____ F.3d)

(January 9, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:

(x) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is also DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is Denied.

ENTERED FOR THE COURT:

"s/E. Grady Jolly"

United States Circuit Judge

(2)

No. 94-1454

In The

Supreme Court of the United States

October Term, 1994

CAROL PLANT,

Petitioner,

vs.

VOUGHT AIRCRAFT COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAUREEN F. MOORE
TRUE ROHDE & SEWELL, P.C.
Eighty-Eighty Central
Ninth Floor
Dallas, Texas 75206
(214) 368-1500
(214) 987-0696 (fax)

Counsel of Record
for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals has applied this Court's standard in determining Petitioner did not raise a genuine issue of material fact on either her Title VII or ADEA claim?

2. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals has applied this Court's standard in determining Petitioner did not raise a genuine issue of material fact on her ERISA claim?

LIST OF PARTIES

All parties are set forth in the caption to this matter. Pursuant to Rule 29.1 Respondent's parent corporation, of which it is a wholly owned subsidiary, is Northrup-Grumman Corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

A. Course of Proceedings and Opinions Below 3

B. Statement of Facts 4

SUMMARY OF ARGUMENT 9

ARGUMENTS SUPPORTING DENIAL OF THE PETITION 10

A. The Decision of the Fifth Circuit is Correct as Plant Presented No Evidence From Which a Factfinder Could Infer Vought Discriminated Against Her On Account of Either Her Age or Sex 10

B. The Decision of the Fifth Circuit On Plant's ERISA Claim is Also Correct as There Is No Evidence From Which a Factfinder Could Infer Vought Intended to Prevent Plant from Exercising Her Statutory Rights 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986) 16, 18

Celotex Corporation v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986) 16, 18

Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 106 S. Ct. 1348 (1986) 15, 18

McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973) 10, 11, 14

Simmons v. Wilcox, 911 F.2d 1077 (5th Cir. 1990) 18

St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S. Ct. 2742 (1993) 9, 10, 11, 12, 13, 14

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 10, 14

Unida v. Levi Strauss & Co., 986 F.2d 970 (1993) 18

OTHER AUTHORITIES

Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-34 2

Employment Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1140 ..... 3, 17

Rule 56 – Federal Rules of Civil Procedure 17, 19

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e17 2

No. 94-1454

In The

Supreme Court of the United States

October Term, 1994

CAROL PLANT,

Petitioner,

vs.

VOUGHT AIRCRAFT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES SUPREME COURT:

Vought Aircraft Company ("Vought") files this Brief in Opposition to this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit asking this Court to deny the Petition for Writ of Certiorari ("Petition") to review the opinion issued on November 30, 1994 by the United States Court of Appeals for the Fifth Circuit. In support of this request, Vought respectfully shows the Court as follows:

JURISDICTION

This Court's jurisdiction of this appeal is based on the judgment and opinion of the Fifth Circuit Court of Appeals entered on November 30, 1994. The Petitioner's suggestion for rehearing en banc, which was also treated as a petition for panel rehearing, was denied by the Fifth Circuit on January 6, 1995. This Court has jurisdiction to review the judgment of the Fifth Circuit under 28 U.S.C. § 1254(1) and the Petition was timely filed within ninety days of the denial of the petition for panel rehearing as required by Rule 13.4, Supreme Court Rules.

STATUTES INVOLVED

This case was brought alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17 ("Title VII"); age discrimination in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-34 ("ADEA"); and deprivation of pension rights in violation of the Employment Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001-461 ("ERISA"). The particular statutory provisions are as follows:

> It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex, ...

42 U.S.C. § 2000e-2(a) [Title VII].

> It shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . .

29 U.S.C. § 623(a) [ADEA].

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . .

29 U.S.C. § 1140 [ERISA].

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND OPINIONS BELOW

Petitioner's summary of the opinions is essentially correct, but incomplete. Petitioner has failed to present a detailed description supporting the holdings of the Fifth Circuit Court of Appeals, and Vought respectfully urges this Court to review these holdings with Petitioner's statements.

The Fifth Circuit held that Petitioner Carol Plant ("Plant") was unable to raise a genuine issue of material fact on any of her claims; thus, preventing her from

defeating Vought's motion for summary judgment.[1] The Fifth Circuit found that Plant was not able to substantiate her claims that her critical skills were the same as two other employees who were retained during the reduction in force or that Vought failed to follow its policy on reductions in force. In addition, the fact Plant alleged she was qualified to be a secretary, without more, could not be used to raise an issue of discrimination. The mere fact that Vought knew Plant's age and sex also failed to raise a question as to whether she was terminated for a discriminatory reason, particularly since an older female employee, whose age and sex were also known, was retained. Finally, there was no evidence to show a causal relationship between Plant's threat, made two years before her layoff, to file an EEOC charge and her eventual evaluations and layoff.

The Fifth Circuit also held that Plant's ERISA claim was unsubstantiated, particularly since she submitted no evidence of intent to violate ERISA, other than the same alleged facts used for her Title VII and ADEA claims. Therefore, summary judgment was affirmed as to all counts.

B. STATEMENT OF FACTS

While Plant's statement of the facts is essentially correct, because of important omissions, it is incomplete.

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[1] As the Fifth Circuit agreed with the District Court's findings that Petitioner presented no evidence of pretext, it did not determine whether or not Petitioner had established a *prima facie* case of discrimination on any of her claims.

Therefore, Vought submits the following statement which contains those omitted, and important, facts.

It is undisputed that Vought has been suffering and continues to suffer a business down-turn due to the decreasing number of orders for commercial and military aircraft. (R. Vol. I at 63, ¶ 6; 107-08, ¶ 3). These business conditions required that employees be laid off and 401 salaried employees were laid off between November of 1992 and January of 1993. (*Id.* 64, 109, ¶ 7). Vought utilized a specific procedure to determine which salaried employees would be laid off, which was set forth in company directive 214.1. (*Id.* at 107-08, ¶ 3; 112-22). The criteria considered under this company directive included "[p]erformance, seniority and critical skills". (*Id.* at 108, ¶ 4; 112, ¶ 1.6). Seniority was the governing factor only when "performance and critical skills are essentially equal to – [o]ther department employees in the same classification, [o]ther employees in the same job ladder". (*Id.*). If an employee is identified to be laid off, Vought attempts to find a position for the employee. (*Id.* at 108, ¶ 4; 112, ¶ 1.7). If no other position can be found before an employee is laid off, the Vice President of Human Resources must approve the layoff. (*Id.* at 109, ¶ 6; 112, ¶ 1.1). If the employee has between fifteen and twenty years seniority, the cognizant Vice President must also concur. (*Id.*). If the employee has more than twenty years seniority, the President of Vought must concur with the layoff before it is effective. (*Id.*). As Plant had more than twenty years seniority, (*Id.* at 63), before she could be laid off, the lay off would have to be approved by all the above individuals. This policy was followed, without exception, for the hundreds of layoffs of management

personnel which occurred. In addition, there is no evidence that any particular group, whether based on age, sex, or other protected status, was adversely impacted by application of this policy.

Plant held numerous positions with Vought throughout her career, and in 1990 she was temporarily transferred to a secretarial pool, from which she applied for other, regular positions in the company. (*Id.* at 64-65, ¶ 10). On May 27, 1991, she was able to transfer to a Planning Aide position, a salaried position in which she remained until she was laid off in November of 1992. (*Id.* at 63, ¶ 4).

Plant's particular Planning Aide assignment was in Personnel Administration for the Overhead Planning and Control Department. (*Id.* at 62-63, ¶ 3). It is undisputed that there was only one other individual in that same position, M. E. McCauley ("McCauley"), who is also a female and who is older than Plant. (*Id.*). Because of the lack of work, it became necessary to eliminate one of these positions. (*Id.* at 63, ¶ 6). Pursuant to the directive on layoffs, a stacking was made of both Plant and McCauley in order to compare performance, seniority and critical skills. Plant did have more seniority than McCauley, but her performance and critical skills were not as good as McCauley's. (*Id.* at 64, ¶ 7; 69-96). In particular, in her performance evaluations, completed not by McCauley but by Plant's supervisor, Plant was marked down in attendance and communication skills, and she had specific problems in other areas as well. (*Id.* at 69-77). In particular, in 1992 Plant was late to work on 81 separate occasions. (*Id.* at 64, ¶ 8). McCauley was not marked

down in any areas, and she did not have the same attendance problems that Plant had. (*Id.* at 78-96). Therefore, it is clear McCauley's performance was better than Plant's and Plant was therefore rated lower than McCauley. As such, consideration of the relative seniority of the two individuals was not relevant to the decision as to which employee would be laid off.

Finding an open position for which Plant was qualified was an almost impossible task as there were very few open positions because of the number of layoffs. (*Id.* at 64, ¶ 10). Vought did consider whether to offer Plant a secretarial position, which she had held in the past. (*Id.* at 64-65, ¶ 10). However, her most recent secretarial assignment, in 1990, was not successful as during that assignment it became apparent that Plant did not demonstrate the computer skills necessary to perform as a secretary, she did not learn those skills, nor did she have the attitude necessary to learn the job. Therefore it was determined that there was no position for which she was qualified. (*Id.* at 64-65, ¶ 10; 103-04).

Plant alleges she could have taken the job performed by Mr. James Hendricks, a younger, black male employee. Despite Plant's contentions to the contrary, that position was not the same as the one she held previously. Rather, it was a higher level position and required a higher degree of skill, which Plant did not possess. (*Id.* at 65, ¶ 11; 152-53; Vol. II at 167, 176, 328-33).[2] No other positions were available for

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[2] In addition, as it was a higher rated position there were greater performance expectations for the position. Therefore, employees' performance in Hendricks' and Plant's positions could not be compared as to do so was like comparing apples and oranges.

which Plant was qualified. (Vol. I at 66, ¶ 15). Since she was the lowest ranked employee, pursuant to the company directive, Plant was selected for layoff over McCauley, the older female employee, who was retained. (*Id.* at 64, ¶ 9). Vought complied with all provisions of company directive 214.1, including determining whether there were other jobs for which Plant was qualified, and obtaining approval of all necessary individuals, including the President of Vought before determining that the layoff of Plant was appropriate. (*Id.* at 66, ¶ 15; 105-06). Plant was informed of her layoff on November 20, 1992, but her seniority entitled her to salary continuance through January 29, 1993. (*Id.* at 109, ¶ 7). Throughout the company, **no exceptions** were made to the order of layoff for the 401 salaried employees who were laid off. (*Id.*).

As Plant had more than twenty years seniority, she was vested in the pension plan and she can elect to begin receiving her retirement benefits when she reaches age 65. (*Id.* at 109-10, ¶ 8). Plant would not be eligible, however, for an early retirement benefit as she is no longer an employee. One of the early retirement benefits offered at Vought is the "Magic 85" program. (*Id.*) Under "Magic 85", an employee may begin receiving early retirement benefits when he or she reaches age 55 and the total of his or her age plus years of seniority is at least 85. (*Id.*). Plant was approximately seven years away from qualifying for "Magic 85". (*Id.*). She would have been eligible only if she remained employed until January 1, 2001. (*Id.*).

Finally, Plant testified that her actual complaint about her layoff and termination was that she was the victim of performance and seniority discrimination. (*Id.* at 154, 156, 161-64).

SUMMARY OF ARGUMENT

The Fifth Circuit's determination that the District Court correctly granted summary judgment on all of Plant's claims does not warrant review by this Court because the decision correctly applies this Court's holding in *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742 (1993). In *St. Mary's*, this Court stressed that in order to prevail on any claim of discrimination, a plaintiff must be able to point to evidence from which it can be inferred that the employer acted with a discriminatory intent. It is not sufficient merely to call the employer's decision into question through speculation or to demonstrate the employer's stated reason for the action is false. The discrimination statutes require that there be evidence to demonstrate that the employer took the action in order to discriminate against the individual in violation of federal law. As there was no evidence from which a factfinder could reasonably infer that Vought acted out of desire to discriminate against Plant on account of her age or sex, summary judgment was properly granted to Vought.

Likewise, the Fifth Circuit correctly held that there was a similar lack of evidence on Plant's claim that she was laid off in order to prevent her from taking early retirement seven years hence. Once again, there is no evidence from which a factfinder could reasonably infer that Vought possessed any intent to deny Plant any rights under ERISA and summary judgment was appropriate.

ARGUMENTS SUPPORTING DENIAL OF THE PETITION

A. THE DECISION OF THE FIFTH CIRCUIT IS CORRECT AS PLANT PRESENTED NO EVIDENCE FROM WHICH A FACTFINDER COULD INFER VOUGHT DISCRIMINATED AGAINST HER ON ACCOUNT OF EITHER HER AGE OR SEX.

Plant's request to this Court to exercise jurisdiction is based solely on her argument that the decision of the Fifth Circuit Court of Appeals is contrary to three decisions of this Court in *St. Mary's, supra, Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981) and *McDonnell Douglas Corporation v. Green,* 411 U.S. 792 (1973). That request, however, is based solely upon speculations which she "argues" satisfy her burden to raise a genuine material fact concerning the existence of pretext. As in the two courts below, she once again fails to identify any evidence which would support a finding of discrimination. The Fifth Circuit's application of *St. Mary's* does not require nor warrant review by this Court.

This Court's most recent examination of the burdens of production and persuasion in discrimination cases is set forth in *St. Mary's, supra.*[3] As in the instant case, the plaintiff in *St. Mary's* did not challenge the finding that the employer met its burden to articulate a legitimate, non-discriminatory reason for its actions. The only issue was whether, by demonstrating the employer's reason was false, the plaintiff proved pretext. Again, as in the instant case, no such showing was made. Noting that

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[3] Vought does not dispute the basic proof formula set forth in Plant's Petition.

liability for discrimination is dependent upon a finding of intent, the Court stated:

> We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, *that the employer has unlawfully discriminated*. We may, according to traditional practice, establish certain modes and orders of proof, including an initial rebuttable presumption of the sort we described earlier in this opinion, which we believe *McDonnell Douglas* represents. But nothing in the law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.

___ U.S. at ___, 113 S. Ct. at 2751 (emphasis in original). Therefore, if a plaintiff cannot point to any facts which could give rise to an inference of discrimination, there can be no violation of the law.

Plant believes she has raised a genuine issue of material fact on pretext by arguing the following: 1) she was entitled to her last position on the basis of her seniority; 2) she was qualified for an available scheduling position which was given to a younger male; and, 3) there was a secretarial position for which she was qualified. Each of these propositions, as stressed in Plant's own Petition, is nothing more than her "argument" that discrimination is the real reason that she was laid off.

Plant alleges that Vought improperly relied upon a co-worker's record of Plant's absences to determine she

should be ranked lower than the co-worker, who was also a female and who was older than Plant.[4] Plant's entire argument is based upon her allegation that the attendance record was false. As clearly set forth in *St. Mary's*, even if the record were shown to be false, it would not require that a finding of discriminatory intent be made. Moreover, the co-worker who allegedly credited the false record was not involved in the decision to lay off Plant. Therefore, the Court of Appeals correctly found this alleged evidence to be insufficient to raise even a hint of discrimination, let alone a genuine issue of material fact.

Second, Plant also argues it is her opinion that she was qualified for and able to do the higher labor grade position which was given to Hendricks. Once again, however, she presented no evidence that she was indeed qualified. Moreover, even if she were able to show she was qualified, the mere fact that another individual, who is male, received the position is not sufficient to raise the spectre of intentional discrimination. At best, it may create the existence of a *prima facie* case of discrimination, which is rebutted by Vought's legitimate non-discriminatory reason – that Hendricks possessed better qualifications. As Plant has acknowledged that Vought did indeed articulate a legitimate non-discriminatory reason for its action, she must come forward with some fact from which a factfinder could reasonably conclude that Hendricks was actually chosen because he is a male. Plant's

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[4] It is difficult to even conceive how Plant could establish a *prima facie* case of either age or sex discrimination, since the individual who allegedly received the preferential treatment was older and female.

only "fact" is that it occurred, which constitutes no evidence whatsoever.

Third, Plant also argues she should have been given a secretarial position. Initially, it should be noted that she never identified a specific open position which she could have filled. Moreover, Vought stated that her previous performance in the secretarial pool demonstrated Vought did not consider her qualified for a secretarial position. Plant does not dispute that this preferred evidence satisfied Vought's burden of articulating a legitimate, nondiscriminatory reason for its actions. Once again, Plant's sole argument on pretext is that she disagrees with Vought's opinion of her skills and abilities; therefore, Vought's reason must, in actuality, be false. Absent any other evidence, as with her other arguments, this is insufficient to raise a genuine issue of pretext. Therefore, the Fifth Circuit correctly applied *St. Mary's* to this case.

Finally, Plant alleges that two years before her layoff and before she received the Planning Aide position, she raised the possibility of filing an EEOC charge. Nothing adverse occurred, until an older female employee was selected for retention over Plant. She failed to introduce any evidence of a causal connection between her alleged threat and her eventual layoff. Once again, there is nothing from which a factfinder could possibly infer Vought desired to discriminate against Plant on account of her age and sex, thereby confirming the correctness of the Appellate decision.

Plant's request for review is based upon a misinterpretation of this Court's holding in *St. Mary's* and Rule

56 of the Federal Rules of Civil Procedure.[5] Plant argues the Fifth Circuit misapplied the law as it found no evidence to support Plant's allegation that she was capable of doing the job given to Hendricks. Plant believes that if she would have created a fact issue concerning her qualifications and Hendricks, based solely upon her personal opinion, she could overcome summary judgment. She also alleges the Fifth Circuit erred in finding that merely because Plant had worked as a secretary before did not give rise to an inference that she was not offered a secretarial position because of her sex or age. Even if a fact issue were raised, it is on an issue not related to whether there is even a hint from which it could reasonably be inferred that Plant was the victim of age or sex discrimination. Plant alleges the Court of Appeals incorrectly forced her to bear the ultimate burden and prove her case in response to a motion for summary judgment, when in actuality the Fifth Circuit was only following this Court's precedent and requiring that there be at least some inference of discrimination which could create an issue of fact to be decided by a factfinder. Moreover, Plant's own

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[5] Plant argues review is required because the **District Court** improperly applied *St. Mary's*, *Burdine* and *McDonnell Douglas*. However, since the Court of Appeals reviewed the matter *de novo* and issued its own, separate opinion, what the District Court may or may not have found should serve as no basis for review by this Court. Rather, the only focus should be on the decision of the Fifth Circuit Court of Appeals. Moreover, the cases with which Plant alleges the Fifth Circuit decision conflicts were rendered by other Courts of Appeals, not by this Court, were rendered prior to the decision in *St. Mary's*, and require a lesser showing to show discrimination than articulated by this Court.

inferences and findings were that she was actually discriminated against on account of her performance and seniority.

Rule 56 provides when there are no genuine issues of material fact and when the moving party should be granted judgment as a matter of law, summary judgment is appropriate. In *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986) this Court detailed what type of evidence was sufficient to create a genuine issue of material fact sufficient to defeat a motion for summary judgment. While respondents in that case alleged numerous conspiracies, only one could have possibly demonstrated there was a violation of antitrust law, which was not sufficient:

> Therefore, unless, in context, evidence of these "other" conspiracies raises a genuine issue concerning the existence of a predatory pricing conspiracy, that evidence cannot defeat petitioner's summary judgment motion.

Id. In the instant case, none of the alleged issues of fact concerning the difference of opinion between Vought and Plant concerning Plant's performance is sufficient to demonstrate the existence of a discriminatory motive. What the facts did show is that an older female employee was selected for retention over Plant.

In addition to demonstrating an issue relevant to the ultimate outcome exists, this Court has also pointed out that the issue must be "genuine":

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the

> language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial.*"

Id. at 587, 106 S. Ct. at 1356 (footnote omitted; emphasis in original). Absent such evidence, summary judgment should be granted. Further explanation of what creates issues of fact sufficient to overcome a summary judgment motion was provided in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2612 (1986). It is not sufficient that the non-moving party present just a scintilla of evidence. Rather there must be sufficient evidence presented in response to a motion for summary judgment from which a factfinder could reasonably find for the non-moving party. In the instant case, that would require some proof from which it could be found that Plant was the victim of age or sex discrimination. Absent evidence of discriminatory intent, as is the case herein, there is no evidence from which a factfinder could find for the nonmovant, and summary judgment must be granted.

Additional guidance was provided by this Court in *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986), wherein the Court required that, in order to defeat a motion for summary judgment, a nonmovant must make a sufficient showing on an essential element of the claim on which that party bears the burden of proof. In the instant case, there are no facts which would indicate Plant could bear the ultimate burden of proof to demonstrate that Vought intended to discriminate against her on account of either her age or sex. The only issue which arguably could exist is whether Plant or Vought was correct concerning the opinion of Plant's performance. Such an issue, however, is neither genuine

nor could it be used to satisfy Plant's ultimate burden of proving discriminatory intent. As there was no such evidence in the instant case creating a genuine issue of material fact which could lead a reasonable factfinder to conclude that there has been a violation of either Title VII or the ADEA, the Court of Appeals correctly applied this Court's interpretation regarding Rule 56. Thus, there is no basis for review of the Fifth Circuit's decision.

B. THE DECISION OF THE FIFTH CIRCUIT ON PLANT'S ERISA CLAIM IS ALSO CORRECT AS THERE IS NO EVIDENCE FROM WHICH A FACTFINDER COULD INFER VOUGHT INTENDED TO PREVENT PLANT FROM EXERCISING HER STATUTORY RIGHTS.

The Fifth Circuit also determined that Plant failed to carry her burden sufficient to demonstrate that Vought intended to deprive her of the ability to take early retirement in 2001 by laying her off in 1992. Section 510 of ERISA, which Plant alleges was violated, makes it unlawful:

> [F]or any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

29 U.S.C. § 1140. Plant claims only that Vought intended to interfere with her possible attainment of the right to take early retirement in 2001. However, Plant relies only

on the same evidence she alleges demonstrates a fact-finder could find both age and sex discrimination and presents no specific evidence from which it could be inferred that Vought's intention was to violate ERISA.

Plant cites no authority in her Petition to demonstrate that there is any decision of this Court with which the Fifth Circuit's decision is in conflict. In fact, she cites no Court of Appeals' decision with which the Fifth Circuit's decision is in conflict, or any authority that would indicate the Fifth Circuit is incorrect. The Fifth Circuit, correctly applying Section 510, requires that a plaintiff prove that the employer acted with the specific intent to violate ERISA in order to prevail. *See Unida v. Levi Strauss & Co.*, 986 F.2d 970, 979-80 (1993); *Simmons v. Wilcox*, 911 F.2d 1077, 1082 (5th Cir. 1990).[6] As set forth above, under *Matsushita, Anderson, supra* and *Celotex, supra*, this Court requires that there be evidence sufficient to demonstrate intent, which is clearly lacking. Plant's only "evidence" is her argument that Vought intended to violate her rights, supported by nothing other than her own personal belief. As such beliefs are not competent evidence of intent, she has failed to present sufficient evidence to raise a genuine issue of material fact and Vought was properly granted judgment as a matter of law. Since the Fifth Circuit did no more than apply this Court's decisions in determining that summary judgment was warranted, there is no purpose to be served by this Court's review of that decision.

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[6] Plant does not challenge the Fifth Circuit's requirement that intent be demonstrated.

CONCLUSION

Plant has not identified any provision of the Fifth Circuit's decision affirming the grant of summary judgment which conflicts with a decision of this Court. Were her position adopted such that personal beliefs and differences of opinion were sufficient to withstand summary judgment, that position would result in a reversal of all of this Court's precedent relating to the interpretation of Rule 56 and would result in an effective repeal of Rule 56. As there is no basis for considering such a result, and because there are no issues of precedential value, this case does not warrant review by this Court. For the reasons set forth above, Vought respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

MAUREEN F. MOORE
TRUE ROHDE & SEWELL, P.C.
Eighty-Eighty Central
Ninth Floor
Dallas, Texas 75206
(214) 368-1500
(214) 987-0696 (fax)

Counsel of Record for Respondent Vought Aircraft Company